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IN THE

Supreme Court of the United States

October Term, 1979

NO. 79-6108

EMMA ARMOUR, et al.,

Appellants,

v.

JACK P. NIX, et al.,

Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

MOTION TO AFFIRM WITH SUPPORTING BRIEF ON BEHALF OF THE STATE APPELLEES

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MOTION TO AFFIRM

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Come now the State Appellees (i.e. those defendants below comprising the State Superintendent of Schools and State Board of Education of the State of Georgia), and pursuant to Rule 16 of this Honorable Court move that the final judgment and decree of the statutory three-judge District Court be affirmed on the grounds: (1) that the decision below is more than amply supported by the evidence presented, and is so obviously correct in light of this Court's prior adjudications as not to warrant further

argument, and (2) because it is manifest that the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument.

This ____ day of April, 1980.

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BRIEF IN SUPPORT OF MOTION TO AFFIRM

PART I

PRELIMINARY STATEMENT

This case is an attack upon the existence of county and city government in Georgia—at least insofar as its qualitatively and quantitatively most important governmental function, "public Education", is concerned.[1] While pat-

[1] Unlike the situation in many states where a large number of tiny splinter school districts are sometimes found within a single county, education in Georgia is basically a function of county government. E.g. Art. VIII, Sec. V, Par. II, of the Constitution of the State of Georgia of 1976 (Ga. Code Ann. § 2-5302), *Stewart v. Davidson*, 218 Ga. 760, 763 (1963); *Wallis v. Blue*, 263 F. Supp. 964, 970-971 (N.D. Ga. 1967). While some cities, as Atlanta, have been permitted to continue their own independent school systems, the State Constitution prohibits the creation of new "city" school systems. Art. VIII, Sec. V, Par. VI, of the Constitution of the State of Georgia of 1976 (Ga. Code Ann. § 2-5306). A county board of education is the county's governmental authority in school matters. *Rosser v. Meriwether County*, 125 Ga. App. 239, 241-242 (1971).

terned after previous unsuccessful attempts to have courts set aside the boundaries of separate and autonomous school districts in order to improve "racial balance",[2] the present case would go far beyond anything yet asked of the courts in a number of ways.

To start with, there is simply the mammoth size of the judicial undertaking requested. While they have at various stages of the litigation below said they wanted "consolidation" or a "federation structure", and at other times spoken in terms of "contractual arrangements", it is clear that regardless of label, appellants (plaintiffs below) want the six counties and four cities they have named as defendants to operate jointly as a unitary structure "without the limitation of political boundary lines". *See* Amended and Substituted Complaint, pp. 38-40. As the three-judge district court noted, the six county area involved extends 70 miles from southwest to northeast and approximately 50 miles in every other direction. The area covers 1,925 square miles, which is roughly equal to the entire state of Delaware, or the entire state of Rhode Island. *See* Order dated March 2, 1978. The consolidated, federated, or otherwise combined "school district" proposed by appellants would have in excess of 300,000 pupils. It may be remembered that in denying interdistrict relief in *Bradley v. School Board of the City of Richmond, Virginia*, 462 F.2d 1058, 1062, 1068 (4th Cir. 1972), *aff'd. by an equally divided court*, 412 U.S. 92 (1973), the Court of Appeals was taken back by the prospect of creating a mere 750 square mile school district having 100,000 students.

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[2] Appellants' original complaint, filed in 1972, appeared to track *Spencer v. Kugler*, 326 F.Supp. 1235 (D. N.J. 1971) [3-judge district court], *aff'd.*, 404 U.S. 1027 (1972). Their "Amended and Substituted Complaint," filed in 1975, was drafted in light of *Milliken v. Bradley*, 418 U.S. 717 (1974).

A second way in which this case differs from the other "metro" or "multi-district" cases which have reached this Court is that with the possible exception of *Spencer v. Kugler*, 404 U.S. 1027 (1972) [interdistrict remedy denied], all prior actions appear to have involved a central city school district which was found by the court to be racially nonunitary—the plaintiffs residing *in those districts* consequently incurring a constitutional deprivation or injury about which they had standing to complain. *See*, e.g. *Milliken v. Bradley*, 418 U.S. 717, 725-726 (1974) [interdistrict remedy denied]; *Bradley v. School Board of City of Richmond, Virginia*, 462 F.2d 1058, 1061 (4th Cir. 1972), *aff'd. by an equally divided Court*, 412 U.S. 92 (1973) [interdistrict remedy denied]; *Evans v. Buchanan*, 393 F.Supp. 428, 430 (D. Del. 1975), *aff'd.*, 423 U.S. 963 (1976) [interdistrict remedy allowed]; *Newburg Area Council, Inc. v. Board of Education*, 510 F.2d 1358, 1359 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975) [interdistrict remedy allowed]. In the present case the appellants reside in the City of Atlanta, a city whose school system had been adjudicated to be unitary before the instant complaint was filed. Indeed the three-judge district court below noted not only the unitary status of the City of Atlanta's schools, but also pointed out that the other defendant counties and cities in the action were in substantially the same situation—all being either unitary or operating under court-imposed desegregation plans. It appears, in other words, that unlike the plaintiffs in the other cases (excepting *Spencer v. Kugler*), appellants in this case, being residents of Atlanta, were already enjoying that which this Court declared in *Milliken v. Bradley*, 418 U.S. 717, 746 (1974), to be their constitutional right, i.e. "to attend a unitary school system *in that district*."

A third way in which this case differs from at least some

of the other metro cases is that the situation is not one of an impoverished, underfunded central city school system (predominantly black) surrounded by more affluent suburban school systems (predominatly white). *See Milliken v. Bradley*, 418 U.S. 717, 759-760 (1974) [dissenting opinion of Mr. Justice Douglas]. To the contrary the City of Atlanta, where appellants reside, has throughout the period covered by this litigation had a greater school property tax digest per pupil than any of the other defendant counties or cities, and the City of Atlanta has in fact consistently expended more moneys per pupil than any of the other defendant counties or cities.

A fourth way in which this case differs from most of the other "metro" or "multi-district" cases to reach this Court is the already mentioned county and city organization and operation of public schools in Georgia—as distinct from the large number of small splinter school districts often seen elsewhere.[3] In addition to the much deeper roots of counties and cities as means of local self-government than sub-county "school district", this larger operating unit (i.e. county or city) tends to reduce inter-district disparities of per-pupil wealth, socio-economic conditions, and racial composition, from the level apt to prevail where the smaller splinter districts exist. Unlike the situation in the Detroit area [interdistrict remedy denied] or Wilmington, Delaware area [interdistrict remedy allowed], for example, all of the "school districts" (i.e. counties and cities) in the present litigation have "public housing", and all have more than "token" numbers of black and white students.

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[3] In the Detroit "metro" case there were 85 school districts in the three county metropolitan area. *See Milliken v. Bradley*, 418 U.S. 717, 729-730 (1974).

For reasons we shall come to, the more than slightly mind-boggling proposition advanced by appellants, namely that six rather large counties and four cities should be required to consolidate, federate, or otherwise compelled to operate their school systems jointly and without regard to political boundaries (presumably requiring joint or common administration with uniform decisions as to curricula, course offerings, spending and taxation) is without precedent, is unsupported by and indeed quite contrary to the evidence adduced. It was so correctly rejected by the three-judge district court below under prior adjudications of this Honorable Court as to call for affirmance without the necessity of further argument.

OPINIONS BELOW

The relevant orders and final judgment of the statutory three-judge district court are correctly set forth as attachments to appellants' Jurisdiction Statement.

QUESTIONS PRESENTED

1. Whether jurisdiction properly lies in this Honorable Court under 28 U.S.C. § 1253 and 28 U.S.C. § 2281.

2. Whether the decision of the three-judge district court below was supported by ample evidence and is so obviously correct under this Court's prior adjudications as to obviate the need for further argument, calling instead for summary affirmance by this Court.

3. Whether it is manifest that the questions upon which the decision in the cause depends are so unsubstantial as not to warrant further argument, but to instead call for this Court's disposition by the grant of appellees' motions to affirm.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Since this litigation stems from the reflection of ever changing racial *residential* patterns *in public education*, it is perhaps well to start with some brief observations on what the demographic situation is in the counties and cities involved in this case. In looking at the Atlanta metropolitan area one finds much that is similar, but also certain things dissimilar, to what is seen in American cities generally (i.e. where both substantial black and substantial white populations are present). Perhaps unlike many other cities, there is at present a considerable degree of "spotted integration" in the Atlanta area, with individual black families having purchased homes in recent years in many predominantly white suburban subdivisions. Moreover, there are old established black communities in all of the defendant counties and cities, these communities lying at all points of the compass (and at varying distances) from downtown Atlanta. As appellants' principal expert witness, Dr. Karl Taeuber, conceded, black citizens had "greater access to the suburbs," and in fact resided in greater numbers in the suburbs in the Atlanta area than in various northern cities (such as Detroit) with which he was familiar, and where, he testified, many suburban areas had virtually no black residents whatsoever. Tr. Vol. III, pp. 40, 49 (Taeuber). Dr. Taeuber knew of no legal barriers, past or present, to *interdistrict* migration in the six county area, and admitted that black migration has gone on both to and from Atlanta and the surrounding counties, with enormous increases over the past few years, for example, in the black population of suburban and still predominantly white DeKalb County. Tr. Vol. III, pp. 49-63 (Taeuber).

On the other hand, it cannot be gainsaid that as in seemingly all other large urban areas of our Nation, pronounced ethnic or racial residential patterns do exist. While racially identifiable black neighborhoods have existed in the City of Atlanta since at least the turn of the century, an enormous black in-migration began following World War II which caused these neighborhoods to expand rapidly and massively. Adjoining white neighborhoods became "transitional" (i.e. temporarily integrated) and then "all black". While black citizens were flowing into Atlanta from rural areas (including from farms located in the adjoining counties named as defendants in this litigation), its white citizens, in the 60's and 70's, joined the nationwide suburban movement in increasing numbers. As a result, the white population of the City of Atlanta, which constituted around 65% of the whole from 1940 to 1960, and which was still over half of the City's total population in 1970, had decreased to 40% by 1977 (according to Atlanta Regional Commission estimates). In looking at these percentages, the current situation in Atlanta, it should be noted, is *not* one of a run down black core or central city (or ghetto) surrounded or contained by an affluent "white collar". Black residential concentrations flow outward from central Atlanta towards the east and southwest, growing into adjoining counties complete with "suburban sprawl" and subdivisions in all price ranges. All of this is remarkably like the flow of white residential concentration outwards (and into adjoining counties) in a northerly direction from Atlanta, except that the counterpart of the "spotted integration" in the predominantly white communities is less common in the black communities.

It is this social mobility which has brought about the

demographic patterns of which plaintiffs (now appellants)[4] complain. The result of black citizens moving into the City of Atlanta in large numbers during the 50's and 60's (frequently from farms in nearby counties), and of large numbers of white citizens leaving the city for the same, now "suburbanized" counties (sometimes for subdivisions erected on the very farmlands from whence black citizens had departed) has been a sharp change in racial composition of the City of Atlanta *and its schools*. The city's public schools, once predominantly white, are now 89% black.

Plaintiffs filed their original complaint on June 7, 1972, naming as defendants the State Superintendent of Schools and State Board of Education of the State of Georgia, as well as five counties (Fulton, DeKalb, Cobb, Clayton and Gwinnett) and four cities (Atlanta, Decatur, Marietta and Buford) through their respective superintendents and boards of education. A sixth county (Douglas) was subsequently added as a defendant through its elected school board and superintendent. Contending that the State and its counties and cities were responsible for variances in the racial composition of the differing counties and cities, appellants asserted that county and city boundary lines were "obstacles to desegregation of the public schools in the multi-county-city metropolitan area" and should be "altered or disregarded." Original Complaint, par. 13. It was prayed that the court require defendants to bring about the full consolidation or merger of the 10 defendant county and city school systems into a single metropolitan school system. Original Complaint, pp. 9-10.

Needless to say, the order prayed for by plaintiffs would

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[4] For linguistic ease the appellants will in most instances in this brief be referred to simply as "plaintiffs."

have absolutely mandated injunctive relief restraining the enforcement not merely of a few state statutes, but of the entire State constitutional and legislative framework providing for the governance and control of public education (including the power to tax and spend, issue bonds, eminent domain, etc.) by county and in some instances city government. Mindful of *Spencer v. Kugler*, 326 F.Supp. 1235 (D. N.J. 1971) [three-judge district court], *aff'd.*, 404 U.S. 1027 (1972), where virtually identical issues had been raised (albeit on a less Gargantuan scale), and of *Turner v. Fouche*, 396 U.S. 346, 353 n.10 (1970), the State defendants, along with a number of the local county and city defendants, moved for the convening of a three-judge district county pursuant to 28 U.S.C § 2281. Chief Judge John R. Brown of the United States Court of Appeals for the Fifth Circuit entered an order constituting a three-judge district court on August 14, 1972. The action continued as a three-judge court case when plaintiffs filed their "Amended and Substituted Complaint" complaint on September 30, 1975.

The "Amended and Substituted Complaint" followed this Court's decision in *Milliken v. Bradley*, 418 U.S. 717 (1974), its purpose being to track the language of this Court as to the sort of extraordinary circumstances which might, if demonstrated, permit local school district boundary lines (in *that* case the school boundary lines of small sub-county school districts, some 86 existing within the three county metropolitan Detroit area) to be discarded in favor of an interdistrict remedy.

In their "Amended and Substituted Complaint", plaintiffs, while eliminating their former use of the word "consolidation", continued to demand the same thing using differing words. They continued to ask the three-judge

district court for "an inter-system plan of desegregation" which was to be "without the limitation of political boundary lines", (boundary lines *sine qua non* to the existence of county and city government in the exercise of eminent domain, bond issues, taxation and school operation and management, and quite obviously boundary lines created and maintained by express state constitutional provisions and statutes). While by no means referring to all of the constitutional provisions and statutes whose operation would have to be enjoined were such relief to be granted, plaintiffs asserted that the failure to provide a "federation structure" (the term now used in place of "consolidation") deprived them of "equal protection of the laws" in violation of the Fourteenth Amendment (Amended and Substituted Complaint, pp. 37-38). They demanded that the district court declare unconstitutional and "enjoin the future enforcement of" a number of *expressly designated* State constitutional provisions and statutes pertaining to county and city governance, management and control of public education "to the extent that they confine control and management of public schools within counties to a County Board of Education". (Amended and Substituted Complaint, p. 38).

Following prolonged and massive discovery by both sides, the three-judge district court determined that a bifurcated trial was advisable. During the liability phase, following plaintiffs' case (which was presented in November 1977), seven of the defendants, which might generally be described as outlying counties and cities,[5] filed motions to dismiss under Rule 41(b) of the Federal Rules of Civil Procedure. The district court found that all of the seven defendants filing motions to dismiss were "unitary or

[5] The counties of Gwinntte, Cobb, Clayton and Douglas and the cities of Buford, Marietta and Decatur.

under court jurisdiction" when plaintiffs' suit was filed. It further found that the absence of any *current* violation, or even of any significant violation *of recent vintage*, had attenuated plaintiffs' "historical" evidence (extending backwards for over fifty years). Such evidence in fact but told the three judges what they and everyone else already knew (and which the court judicially noticed), namely that a condition of racial segregation once upon a time permeated all aspects of life in Georgia—including public education. In its order, entered on March 2, 1978, the three-judge district court concluded that plaintiffs had failed to prove their case against the seven movants because of the failure of plaintiffs to show evidence of substantial constitutional violations having an interdistrict impact. The motions to dismiss were granted.

The remaining defendants[6] presented their case later during that same month (March 1978). A number of expert witnesses were presented by both sides and testified at length on demographic patterns and other matters. The three-judge court concluded that the weight of the evidence demonstrated that existing demographic patterns have resulted from economics, choice and spatial factors (e.g. rivers, railroads, industrial areas, etc.) and *not* from present or past governmental discrimination. It further noted that plaintiffs offered no convincing evidence of any concert of action, or tacit or express undertaking on the part of the defendants, to concentrate black citizens within the City of Atlanta while holding down black growth in suburban areas (the thrust of long ended governmental discrimination in Atlanta having been to the contrary a history of unsuccessful attempts to *exclude* black immigration and contain the growth of black com-

[6] The State defendants, Fulton and DeKalb Counties, and the City of Atlanta.

munities). The court concluded that the evidence demonstrated a lack of, rather than the presence of, the substantial interdistrict violation which this Court said in *Milliken* was *sine qua non* to the award of interdistrict relief. Final judgment in favor of the defendants was entered on September 24, 1979.[7] Plaintiffs filed a Notice of Appeal to this Honorable Court on October 22, 1979, their Jurisdictional Statement being filed on or about February 19, 1980, following the grant of a 60 day extension at plaintiffs' request.

PART II

ARGUMENT

1. This action was properly adjudicated by a three-judge district court under 28 U.S.C. § 2281, and appellate jurisdiction lies in this Honorable Court by virtue of 28 U.S.C. § 1253.

In their Jurisdictional Statement, plaintiffs (now appellants) refer to court below's characterization of the three-judge court jurisdiction over the case (pursuant to 28 U.S.C. § 2281) as "unclear." *See* Jurisdictional Statement, p. 3. This, by virtue of what is omitted, is misleading. What the three-judge district court was commenting upon in its use of the word "unclear" was the three-judge court situation as it existed *under the original complaint filed in 1972*, not any lack of clarity following the filing of plaintiffs' "Amended and Substituted Complaint" in 1975. The situation after filing of the substituted com-

[7] In order to protect plaintiffs in the event it should ultimately be determined that the action was not an appropriate matter for adjudication by the three-judge district court (plaintiffs had all along contested the propriety of convening the three-judge court), the originating judge adopted the opinion and order of the three-judge district court as that of the district court sitting as a single judge.

plaint in 1975 was referred to by the court quite differently:

> "It would seem that on its face the complaint involves a very real attack on various portions of the Georgia Constitution and statutes of the State of Georgia" (Order dated Sept. 30, 1977, p. 4).[8]

We think that some examination of both the original complaint and the amended and substituted complaint might be useful in connection with how the latter eliminated any conceivable question as to the necessity of convening the three-judge district court which decided the case.

(a) **The Original Complaint (1972)**

Looking at 28 U.S.C. § 2281, we find that it provides that:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

While 28 U.S.C. § 2281 speaks in terms of restraining the operation or enforcement of State "statutes," it is

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[8] The repeal of 28 U.S.C. § 2281, effective August 12, 1976, Pub. L. 94-381, § 1, 90 Stat. 1119, has no application to this case. Section 7 of the repealing act states:

> "This Act shall not apply to any action commenced on or before the date of enactment."

Both the original complaint (1972), and the "Amended and Substituted Complaint" (1975), were filed prior to August 12, 1976, and the three-judge district court below correctly held that 28 U.S.C. § 2281 remained applicable to this action (Order entered Sept. 30, 1977). *See also Calabi v. Malloy*, 438 F.Supp. 1165, 1167n.4 (D. Vt. 1977).

well settled that it applies to state constitutional provisions as well. *See, A.F. of L. v. Watson,* 327 U.S. 582, 592-93 (1946); *Sincock v. Duffy,* 215 F.Supp. 169, 171-72 (D. Del. 1963) [3-judge district court], *aff'd., sub nom, Roman v. Sincock,* 377 U.S. 695 (1964). The policy, as stated by the Court in *Phillips v. United States,* 312 U.S. 246, 251 (1941), is as follows:

> "To bring this procedural device into play—to dislocate the normal operations of the system of lower federal courts and thereafter to come directly to this Court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission'. *The crux of the business is procedural protection against an improvident statewide doom by a federal court of a state's legislative policy.* This was the aim of Congress and this is the reconciling principle of the cases." [Emphasis added.]

Under their original complaint (as indeed under their "Amended and Substituted Complaint") plaintiffs asked for relief which went far beyond the mere restraining of a "single" State statute or constitutional provision (which in and of itself would be sufficient to invoke the provisions of 28 U.S.C. § 2281). They called for the consolidation or merger of six counties and four cities with respect to their primary governmental activity, "public education", their future school operations to be "without the limitation of political boundary lines". Since the existing organization and operation of public education (along with related taxing and spending decisions, election of school officials, exercise of powers of eminent domain, issuance of bonds and similar matters) was established by and has been maintained pursuant to an entire panoply of State

constitutional provisions and statutes, it seemed to us to follow that this drastic restructuring of Georgia's local governmental organization obviously called for a three-judge district court, particularly in light of the similarity of the issues presented (i.e. under the original complaint) to *Spencer v. Kugler*, 326 F.Supp. 1235 (D. N.J. 1971) [3-judge district court], *aff'd.*, 404 U.S. 1027 (1972).

The sole uncertainty at the time was that notwithstanding the fact that a grant of the relief sought would run rough-shod over, and *factually* restrain the enforcement and operation of a substantial number of State constitutional provisions and statutes, plaintiffs correctly pointed out that in their complaint they had not, in so many words, *expressly* enumerated the constitutional provisions affected, or *expressly* prayed that the operation of the same be enjoined.

The question, as we saw it then and as we see it today, is whether 28 U.S.C. § 2281 is a matter of form or substance. It was our view then, as it is today, that it is substance and not form which controls, and that where the *actual effect* of the relief sought would be to enjoin the "enforcement, operation or execution of any State statute", it matters not whether the statute involved is or isn't expressly named and attacked in the complaint. This seems consistent with this Court's observation in *Phillips v. United States*, 312 U.S. 246, 251 (1941), that:

> "the crux of the business is procedural protection against an improvident statewide doom by a federal court of a state's legislative policy."

This result further seems compelled by the fact that the alternative would appear to be summary dismissal of the complaint. It is axiomatic that equity follows the law. E.g. *United States v. Smelser*, 87 F.2d 799, 801 (5th Cir.

1937); 27 Am. Jur. 2d *Equity* § 123. Courts do not grant equitable relief which is contrary to or not in accordance with law. As this Court said almost one hundred years ago in *Rees v. City of Watertown*, 19 Wall. (86 U.S.) 107, 122 (1874):

> "A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law or even without authority of law."

Legislative enactments have a presumption of validity. It follows that where as here a plaintiff seeks to restrain a governmental official from acting in a certain manner and that official shows that his actions were taken in accordance with a state constitutional provision or statute whose validity, not being attacked, is conceded, the action would be subject to dismissal. As this Court put it in *Ex Parte Bransford*, 310 U.S. 354, 361 (1940):

> "Where by an omission to attack the constitutionality of a state statute its validity is admitted for the purposes of the bill, a determination by the trial court that the assessment accords with the statute would result in the refusal of the injunction and the dismissal of the bill."

In light of *Ex Parte Bransford* the situation with respect to the original complaint as we see it, in other words, was that the case was either a three-judge case or it was no case at all.

(b) **The "Amended and Substituted Complaint" (1975)**

Whatever uncertainty may conceivably have existed on the three-judge court issue under plaintiffs' original complaint (and for the reasons just stated we think that even there three-judge court jurisdiction was present), it seems

obvious that under the "Amended and Substituted Complaint" all doubt has been eliminated. That amendment placed the case at the very center of three-judge court jurisdiction under 22 U.S.C. § 2281. Whether labeled "consolidation," "federation" or anything else, the demand for the restructuring of local government and the creation of a Gargantuan unitary school system covering 1,925 square miles and including over 300,000 pupils would, for the reasons already stated, have continued to require the factual restraining of the operation and enforcement of the constitutional provisions and laws pursuant to which the county and city defendants' schools are presently organized and functioning.

Constitutional provisions and statutes whose operation and enforcement would *of necessity* have to be restrained include, *but are not at all limited to:* Article VIII, Section V, Paragraphs II, V and VI, and Article VIII, Section VII, Paragraph I of the Constitution of the State of Georgia of 1976, and Ga. Code Ann. §§ 32-901, 32-902, 32-902.1, 32-903, 32-905, 32-909, 32-910, 32-912, 32-915, 32-921, 32-927, 32-932, 32-933, 32-934, 32-951, 32-953, 32-954, 32-1002, 32-1004, 32-1008, Code Chapt. 32-11, Code Chapt. 32-14.

While plaintiffs understandably made no compilation in either their original or in their "Amended and Substituted Complaint" of these and other constitutional provisions whose enforcement would have to be restrained in order to grant the relief sought, they nonetheless did, in their "Amended and Substituted Complaint" expressly ask the three-judge district court to declare unconstitutional and "enjoin the future enforcement of", the following:

(1) Article VIII, Section V of the Constitution of the

State of Georgia of 1945 (Ga. Code Ann. § 2-6801) [now Article VIII, Section V, Paragraph II of the Constitution of the State of Georgia of 1976; Ga. Code Ann. § 2-5302];

(2) Article VIII, Section VII of the Constitution of the State of Georgia of 1945 (Ga. Code Ann. § 2-7001) [now Article VIII, Section V, Paragraph VI of the Constitution of the State of Georgia 1976; Ga. Code Ann. § 2-5306]; and

(3) Ga. Code Ann. § 32-901.

All of these provisions of State law deal with the establishment of county and city school systems and the confining of the same to the governance, management and control of their respective boards of education. Additionally, plaintiffs sought in the prayer of their "Amended and Substituted Complaint", to enjoin the enforcement or maintenance of the school system boundary lines provided for in these constitutional provisions and statutes, and to require defendants to pay for an army of "urban planners, educators, sociologists, psychologists, systems engineers, architects and other professionals" in order to develop "a comprehensive plan for *a metropolitan school district*" (if not a single *consolidated* school district, what?).

Whatever gray areas may have existed under the original complaint with respect to "the outer reaches" of 28 U.S.C. § 2281, have nothing to do with the case at bar, as it exists under the "Amended and Substituted Complaint". It involves *the very core area* of the "procedural protection against an improvident statewide doom by a federal court of a state's legislative policy". *Phillips v. United States*, 312 U.S. 246, 251 (1941). Plaintiffs asked for an order restraining the enforcement of State constitutional provisions and statutes on the ground that as

applied these statutes unconstitutionally deprived them of what is claimed to be "equal protection". This is what 28 U.S.C. § 2281 was (and for the purposes of this case is) all about. *See Spencer v. Kugler*, 326 F.Supp. 1235 (D. N.J. 1971), *aff'd.*, 404 U.S. 1027 (1972); *Turner v. Fouche*, 396 U.S. 346, 353 n.10 (1970).

Appellants' reliance on *Costello v. Wainright*, 430 U.S. 325 (1977), in opposing three-judge court jurisdiction, is singularly misplaced. It need but be pointed out that that decision:

(a) involved a complaint which on its face didn't involve any challenge to state statutes, and where there was, when the case started, no reason at all to suspect that a three-judge district court should have been convened to hear the case, 430 U.S. at 326, and

(b) involved at most a possible *"temporary suspension"* of an otherwise valid state statute to effectuate federally mandated relief. *Ibid.*

Unlike *Costello*, in the instant case it was recognized by appellees (and by the originating judge and the three-judge district court), from the very outset, that plaintiffs' action involved a direct challenge to the entire State constitutional and legislative foundation for the organization and operation of public education as a function (indeed the most important function) of local county and city government. Unlike *Costello*, a timely motion to convene a three-judge court was filed. Unlike *Costello*, a three-judge district court was in fact convened to adjudicate, and did adjudicate, the case.

Secondly, plaintiffs attempt to achieve a joint operation

(be it called "consolidation" as in the original complaint, or "federation" as in the amended complaint) "without the limitation of political boundary lines", obviously involves more than the "*temporary* suspension" of a state statute involved in *Costello*. The amended complaint shows on its face that plaintiffs seek, *inter alia*, to have constitutional and statutory provisions providing for the existing operation of school systems by counties and by cities declared unconstitutional, with their future enforcement enjoined. As the three-judge district court put it in its order of September 30, 1977:

> "It would seem that on its face the complaint involves a very real attack on various portions of the Georgia Constitution and statutes of the state of Georgia" [the three-judge court noting that in *Costello* no identifiable rule or regulation had been challenged on its face].

Nor, of course, is the instant action one where a state statute is attacked on the basis that it has been superseded by some federal statute under the "Supremacy Clause" of the Constitution, e.g. *Swift & Co. v. Wickham*, 382 U.S. 111 (1965). That case expressly contrasted the "supremacy clause" situation, where a three-judge district court is *not* required, with "the traditional Due Process Clause, Equal Protection Clause, Commerce Clause, or Contract Clause arguments", where (as in the case at bar) a three-judge court is required. 382 U.S. at p. 120.

Finally, appellants' attempt to cloud the issue by beating a dead horse (pointing out that in addition to attacking constitutional provisions providing for the organization and operation of public education as a function of county and city government, they *also* attack a no longer extant State constitutional provision which once upon a

time provided for separate education of black and white students), is at best an ineffectual attempt at diversion. The defunct constitutional provision, a dead letter for many years before the instant action was filed, was formally stricken from the State Constitution in 1976. No one suggests that an attack limited to this palpably unconstitutional *former* provision, if it were in fact still operative, would require a three-judge court. Its former existence simply has no relevance to those other constitutional provisions and statutes which relate to county and city control and operation of public education in Georgia, which appellants *also* ask to have stricken.

We respectfully submit that the instant action is, and from its incipiency has been, at the very heart of what 28 U.S.C. § 2281 is all about. We further submit, however, that even if it could have been seriously thought, *prior* to the filing of plaintiffs' "Amended and Substituted Complaint", that form prevailed over substance, and that the failure to *expressly* ask that the operation of expressly designated statutes be restrained precluded the application of 28 U.S.C. § 2281, no substantial question exists as to the applicability of the statute subsequent to the filing of the amended complaint (which did expressly seek to declare unconstitutional and enjoin the operation of expressly designated constitutional provisions and statutes). This Honorable Court's jurisdiction under 28 U.S.C. § 1253 is, we submit, obvious.

2. The decision of the three-judge district court below is more than amply supported by the evidence presented, and is so obviously correct in light of this Court's prior adjudications as to call for affirmance without the necessity of further argument.

This Court has consistently held that States have the right to maintain political subdivisions of government

(i.e. counties and cities) and that the resulting diversities (which obviously can and will include differences in ethnic or racial composition as well as of wealth and views on the proper ordering of governmental priorities) do not offend the "equal protection" clause of the Fourteenth Amendment. *See Missouri v. Lewis*, 101 U.S. 22, 30-32 (1879); *Salsburg v. Maryland*, 346 U.S. 545, 550-553 (1954); *McGowan v. Maryland*, 366 U.S. 420, 427 (1961). The Court has applied this rationale directly to the field of public education. *See*, e.g. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 42-44 (1973). It was said by the Court in *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972), that:

> "Direct control of decisions vitally affecting the education of one's children is a need that is strongly felt in our society. . . ." (407 U.S. at p. 469),

with Chief Justice Burger, along with Justices Blackman, Powell and Rehnquist similarly opining that:

> "Local control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well." (407 U.S. at p. 478).

Similarly, in *Spencer v. Kugler*, 326 F.Supp. 1235, 1240-1241, (D. N.J. 1971) [3-judge district court], *aff'd.*, 404 U.S. 1027 (1972), it was observed that:

> "It cannot be said that school district lines based on municipal boundaries are unreasonable."
>
> "Racially balanced municipalities are beyond the pale of either judicial or legislative intervention."

In what we believe (as the three-judge district court below believed) to be the lodestar in cases of this genre, namely *Milliken v. Bradley*, 418 U.S. 717, 744-745 (1974), this Court referred to the extraordinary circumstances

which would have to be shown to permit even "sub-county" school district lines to be disregarded, in the following language:

> "Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of *inter-district* segregation." (emphasis added).
>
> ". . . without an *interdistrict* violation and *interdistrict* effect, there is no constitutional wrong calling for an interdistrict remedy." (emphasis added).

By way of illustrating the sort of interdistrict violations which it thought might justify the grant of interdistrict relief, the Court referred to:

(1) The drawing or alteration of school district lines on a racial basis.

(2) The carving out of new school districts on a racial basis, and

(3) Arrangements whereby children residing in one school district attend school in another school district for purposes of, or where the practical effect is, increased racial segregation,[9]

with Mr. Justice Stewart, in his concurring opinion, adding:

(4) Interdistrict segregation caused by purposeful, or racially discriminatory use of state housing or zoning laws.[10]

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[9] 418 U.S. at pp. 744-748.
[10] 418 U.S. at p. 755.

The three-judge district court below correctly concluded that for all of plaintiffs' evidence of racially discriminatory actions, conduct and policies of governmental offitials *in the distant past*, plaintiffs had failed to prove, while defendants' evidence affirmatively disproved, that such long ended violations (which in almost all instances were even at the time they occurred violations *within* a given county or city as opposed to interdistrict violations) had any substantial residual impact upon *today's* racial residential patterns. The weight of the evidence supported, and we would respectfully say demanded, that the court below decided as it did. Among other things, under each of exceptional circumstances which this Court enumerated in *Milliken* as a possible basis for disregarding political boundaries of school districts (with plaintiffs' burden of proof, we submit, being even higher where as here the boundaries in question are county and city lines rather than smaller sub-county and city units), the evidence in fact demonstrated the opposite of what plaintiffs contended.

(a) **The drawing or alteration of school district lines on a racial basis.**

As to county boundary lines, the uncontroverted evidence showed that with but two exceptions there have been no changes or alterations at all this century. The two changes which have taken place both involved Fulton County, occurring in 1929 and 1931. Plaintiffs neither alleged nor introduced evidence to hint at any racial motivation or impact as to these alterations fifty years ago.

While the municipal defendants in this action have upon occasion expanded their city limits through annexation, the evidence pertaining to such annexations demonstrated that the net effect with respect to the City of

Atlanta (where plaintiffs reside) has been to bring more white than black pupils into its corporate (and hence school system) limits. Insofar as Atlanta's schools are concerned, in other words, the impact of annexation was "integrative" not "segregative." Plaintiffs' own witnesses substantiated this. Tr. Vol. III, pp. 55-56 (Taeuber).

Certainly there was no room for any finding of an inter-district violation based upon evidence of the drawing or altering of county or city boundary lines on a racial basis.

(b) **The carving out of new school districts on a racial basis.**

Suffice it to say that no new school districts have been shown by the evidence to have been "carved out" or created in the six county area *on any basis* (i.e. racial or otherwise). Such a "carve out" or creation of a new splinter school district is in fact precluded by the Constitution and laws of Georgia which make public education a *county* function, and while permitting existing city school systems to continue, prohibit the creation of any new city school system.

(c) **Arrangements whereby children residing in one school district attend schools in another school district for purposes of, or where the practical effect is, increased racial segregation.**

Statistical evidence on non-resident school attedance in the 10 counties and cities involved in this litigation showed that something less than 1/10 of 1% of the pupils in the area were attending public schools other than in the county or city within which they resided. Plaintiffs submitted no evidence to show that these small numbers of nonresident pupils were attending school outside their county or city of residence for racial "purposes", and at such level the practical effect is in any event *de minimis*

(such nonresident pupils in fact consist of both black and white students).

While interdistrict cooperation exists regarding the students of one school system utilizing facilities of other systems (e.g. visits to the Fernbank Science Center in DeKalb County, jointly operated facilities for certain categories of handicapped children, joint purchasing, and the joint use of psychiatrists and consultants), plaintiffs submitted no evidence to indicate that these special programs or cooperative arrangements for handicapped children are being carried out in a racially discriminatory manner. The evidence of defendants that these programs are not conducted on a racial basis in any manner whatsoever was indeed wholly uncontroverted by plaintiffs.

What plaintiffs did focus upon in connection with their evidence about "arrangements" whereby children residing in one county attended school in another on a racial basis, was (as it was in most other aspects of their evidentiary presentation) events of the distant past. Historically, at a time when racial segregation was the law of the State if not of the Nation, some school systems, as Cobb County and Marietta, had contracts which required small numbers of black students to go to the city for their high school education. In the Cobb-Marietta situation the former, having fewer than 70 black high school students, contracted to have them educated in Marietta. The *purpose* of the contract *per se* was not segregatory (no options were available on this point since segregation was then commanded by state law) but to provide a better education, i.e. a larger black high school in Marietta as opposed to a smaller, less well equipped black high school in Cobb County. Nor did it in fact have the "practical effect" of increased racial segregation. Racial

segregation in public education was at the time absolute under State law and hence couldn't be "increased". Of course, all of this has long been academic. Plaintiffs admitted that the Cobb-Marietta Contract ended not later than 1966. Plaintiffs introduced not a scintilla of evidence to show that this contract had any racial impact anywhere which did not end with the contract itself.[11]

(d) Interdistrict segregation caused by purposeful racially discriminatory use of state housing or zoning laws.

Because the entire area is composed of so many uncertainties and speculative views, plaintiffs not surprisingly concentrated the bulk of their evidentiary efforts on a claimed continuing impact of housing, zoning and residence related discrimination of the past. But here too, plaintiffs' evidence not only failed in and of itself, but was outweighed by defendants contrary evidence. This can be seen by looking at the specifics of the historical evidence plaintiffs relied upon.

(i) Buffer Zones, Green Belts, Racial Zoning and other unsuccessful "containment" attempts.

One of the more massive aspects of plaintiffs' evidence is its painstakingly detailed recital of the use of buffer zones, green belts, racial zoning in the attempt to limit and contain the expansion of black residential areas *within the City of Atlanta*. Perhaps the principal difficulty with plaintiffs reliance upon these unquestionably unconstitutional acts of racial discrimination long ago, is the fact that all such attempts were total failures. As their own

[11] Actually, no evidence was tendered by plaintiffs to show any impact of the contract upon Atlanta, or anywhere else other than Cobb County and Marietta, even at the time it did exist. It *never was*, in other words, an interdistrict violation *involving or affecting Atlanta*, where plaintiffs reside.

witnesses stated, these barriers simply didn't work, with the expanding black community simply moving around or through the same. Dep. Q. V. Williamson, pp. 88-89. Moreover, all such racially discriminatory practices, again from plaintiffs' own witnesses, had ended by 1966, dep. Q. V. Williamson, p. 89, and by far the greater portion of the huge population shifts leading to the racial imbalance of which plaintiffs complain *occurred after these discriminatory practices had ended.* It may further be noted that these violations, even when they existed, were of an *intradistrict* not interdistrict nature.

Not only was no evidence introduced of any racial barriers having ever existed to stop movement across county or city lines (as opposed to movement from one neighborhood to another *within* the same city or county), but governmental officials in Atlanta are obviously not empowered to enact zoning regulations or create "green belts" beyond the city limits. Additionally, these unlawful "containment" attempts of city officials in the past is inconsistent with the picture plaintiffs attempt to paint of a plot to concentrate black citizens *in* Atlanta and keep them from moving to the suburbs. Had these improper intracity racial barriers and containment attempts worked, their impact would have been to *prevent* the racial concentrations in Atlanta about which plaintiffs complain—*not* to bring them about.

(ii) **Public Housing.**

Plaintiffs' evidence of larger numbers of public housing units being constructed in Atlanta than in the surrounding counties (in conjunction with the fact that Atlanta's public housing is about 90% black) also demonstrates little if anything in the way of a substantial *interdistrict* violation. Public housing exists in all of the defendant

counties and cities. The evidence demonstrates that public housing largely mirrors the racial composition of the surrounding area. In Cobb County it was 83% white, while in the City of Decatur it was 99% black. The evidence further showed that black citizens living in the central city areas of Atlanta had a pronounced disinterest in moving into public housing outside the central city. New projects outside this area could not fill vacancies notwithstanding the existence of a substantial waiting list for public housing in Atlanta generally.

Finally, even if Atlanta's public housing (and its occupants) were to be plucked up by a giant crane and relocated throughout the six county area, the evidence shows that the racial impact of the relocation of these units would be negligible, not producing any substantial alteration of the existing racial composition of Atlanta or any of the other defendant counties and cities.

In general, defendants' evidence established that existing residential patterns in the Atlanta area are caused by myriad circumstances of personal choice, economics and spatial factors, and that the impact of any past acts or policies of governmental discrimination upon today's inter-county or city variations of racial composition is negligible if it indeed exists at all. Plaintiffs' own expert witness, Dr. Karl Taeuber, while he believed that "racial discrimination" (private and public lumped together) was a factor along with personal choice and economics, could not say or estimate whether such discrimination was 10% or 90% responsible. Tr. Vol. III, p. 66. This inability to quantify would itself seem fatal to plaintiffs' case under *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 420 (1977). Defendants, on the other hand, produced strong evidence to the effect that the forces which caused existing demographic patterns were non-governmental. Dr.

Anthony Pascal, Director of Human Resources Study at the Rand Corporation, and a White House advisor on the development of American Urban Policy, testified that based on his studies, existing levels of residential segregation in the Atlanta area could be attributed to socio-economic factors alone (i.e. even ignoring the factor of personal choice). Dr. David J. Armor, a senior social scientist at the Rand Corporation, testified that based upon his studies of opinion surveys in the Atlanta area, about 90% of the existing racial residential segregation could be attributed to the interaction of black and white preferences—both of which favored "integrated" neighborhoods but only in terms of a neighborhood predominantly of their own race (thus making a stable integrated neighborhood unlikely). Dr. William A. Clark, a professor of geography at U.C.L.A., found in his study of the Atlanta situation that the course of expansion of black communities in Atlanta had been as would have been expected in view of existing spatial factors (e.g. railroads, industrial and commercial areas). He testified that he found nothing to indicate that the patterns of black expansion which have occurred had been altered in any manner by governmental action (such as zoning, the location of public housing or past racial barriers). He pointed to the increasing black population in outlying counties, with a rather dramatic migration into predominantly white DeKalb and Fulton Counties. All of this positively disproved plaintiffs' theory that black citizens have been confined to or prevented from moving out of the City of Atlanta (the presumed "interdistrict" violation asserted by plaintiffs).

3. The questions upon which the decision of the cause depends are so unsubstantial as not to warrant further argument.

The legal standards by which this case was decided by the three-judge district court below are those enunciated by this Honorable Court in *Milliken v. Bradley*, 418 U.S. 717 (1974). Plaintiffs' appeal to this Court is not based upon any questioning of these legal standards *per se*, or upon their use or nonuse by the district court, but instead is predicated upon plaintiffs' view of the weight of the evidence. For the reasons already set forth, we believe that the weight of the evidence not only authorizes but indeed mandates the decision reached by the court below. While plaintiffs have pointed to a vast number of intra-district "violations" in the distant past (obviously we cannot rewrite History), plaintiffs own evidence failed to show *any current inter or intra district violation*, and further failed to prove *any current interdistrict impact of any past inter or intra district violation*. We would submit that since this sole legal question (sufficiency of the evidence) is wholly unsubstantial, this Court's plenary review with additional argument and analysis is unwarranted.

CONCLUSION

For the reasons stated we respectfully submit that the decision below was amply supported by the evidence, is plainly correct, and ought to be affirmed without the necessity of further argument.

Respectfully submitted,

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